A Lawyer's View of the Natural Law

IAN HAMNETT

No doctrine of jurisprudence has so distinguished a history as the theory of the natural law. One of its earliest and noblest expressions is to be found in Sophocles, when Antigone refuses to obey Creon's unjust commands and appeals to a law greater than human ordinance.[1] In the form given to it by Greek Stoicism it was received and developed by the Roman philosophers and jurists; through St Isidore it passed into the middle ages where it found its most perfect expression in St Thomas Aquinas. It was adopted and applied by the Dutch Protestant jurists of the seventeenth and eighteenth centuries and it is still embraced by most Catholic thinkers today. It links the pagan and Christian traditions from classical antiquity to the twentieth century; and while its independence of supernatural revelation can be said to give it value as a *praeparatio evangelica*, its perfect consonance with dogma has led to its almost universal adoption in Catholic thought.

This very acceptance by Catholics has, however, led to a great deal of confusion and to the advancement of some exaggerated and often meaningless claims. It may be useful to subject the natural law doctrine to an analysis based largely on theoretical and practical jurisprudence. Such an analysis will reveal the inadequacy of much that is commonly said about the doctrine as a possible theory of law and will illustrate, perhaps, why few lawyers show much enthusiasm for it.

Although the natural law doctrine is not formally or intrinsically dependent upon revelation, being concerned neither with divine positive law nor with revealed dogma but only with concepts of a purely natural order, it attains perfect consistency only within the context of the Christian religion. As expounded by the pagan philosophers, it cannot stand up to the searching questions: how do you distinguish the *natural* from the merely *normal*? and when you attach moral significance to the one and not to the other, are you not simply giving the name of 'natural' to those acts of which you approve and denying it to those of which you disapprove? so that instead of its being (as you claim) the

[1] *Ant.* 450–60.

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naturalness or otherwise of an act that determines your moral judgment, it is your moral judgment that determines whether or not you call it natural? No answers to these questions based upon mere observation can survive the Humean critique. The Roman philosophers themselves were embarrassed when they came to discuss the relation of the *ius naturale* to the *ius gentium*, and the logical principles put forward by modern philosophy make any attempt to 'demonstrate' the existence of 'natural principles' a hopeless task from the start. As Suarez was to emphasize: 'natural law does not proceed from God as law-giver . . . nor does God manifest Himself in it as a sovereign commanding or forbidding'.[2] Natural law has indeed more in common with what the legal philosopher will call scientific or descriptive than with normative law, and this raises a problem which a purely humanist apologetic cannot resolve. A descriptive law, by definition, cannot be 'broken'; if it is not verified, the observer must restate his law. But the natural law, though descriptive of the fundamental nature of man, and not the product of command, is daily seen to be broken, and yet its defenders do not restate the law but instead call upon those who break it to conform. Classical thought could not surmount this difficulty. It was not until the development of the doctrine by the medieval schoolmen, and above all by St Thomas, that the doctrine of the Fall made it possible to construct an intellectually valid system, in which the existence of a natural law on traditional lines could be reconciled with the demonstrable fact of its non-observance. St Thomas in discussing the natural law in its relation to man lays great emphasis on free will and stresses that while the natural law in its most general sense is simply the participation of the eternal law in the creature (so that creatures without free will cannot help conforming to it under the disposition of Providence) man as a free and rational being has a special relationship to this law and a special function within Providence, as he can act against the law of his being and since the Fall is prone to do so.[3] The natural law, in other words, though intrinsically descriptive, can through man's sin become normative in his regard. Similarly Dante through the mouth of Beatrice offers an account of the natural law that implies the relevance of human freedom, and of the consequences of the Fall:

> così da questo corso si diparte
> talor la creatura, ch'ha potere
> di piegar, così pinta, in altra parte

[2] *De Legibus* 2. 6.
[3] Ia 2ae. 91, 2.

. . . se l'impeto primo
a terra è torto da falso piacere.[4]

Even if it were not the case that a purely humanist account of the natural law was vulnerable to criticism of the kind directed against it by Hume, it would still remain true, in the words of the great Scottish institutional lawyer Lord Stair, that 'this natural law . . . is not equally evident to all men; but the more reason they have, the more clearness they have of it'.[5] Reason may have the inherent capacity to attain to this knowledge, but it frequently fails to do so: the natural reason of the individual man is not necessarily the *recta ratio* of which St Thomas speaks. The priority and autonomy of the natural order is a fact of logic but seldom perhaps a fact of experience. It is important for Christians to understand what part of their beliefs is natural and what part supernatural, but the attempt to construct a purely rational apologetic may have a wrong emphasis, for much of what the Catholic believes to be contained in the natural law will in fact only be seen as such by those who have acquired some degree of faith. Grotius wrote that 'haec . . . quae iam diximus [sc. de iure naturali] locum aliquem haberent, etiamsi daremus . . . non esse Deum',[6] but he could only say that because he already believed.

As a means of establishing certain non-revealed principles without recourse to religious apologetic, the natural law appears then to be inadequate. Where the doctrine approaches more closely to juristic theory and practice it is no more satisfactory. We may start from St Thomas's statements[7] that 'non videtur esse lex quae iusta non fuerit. Unde in quantum habet de iustitia in tantum habet de virtute legis' and again, 'omnis lex humanitus posita in tantum habet de ratione legis, in quantum a lege naturae derivatur. Si vero in aliquo a lege naturali discordet, iam non erit lex sed legis corruptio'. These statements are the essence of natural law doctrine in its bearing upon actual law, and

[4]*Par.* I, 130–5. 'So, though thus impelled, the creature which has the power to turn in a different direction swerves sometimes from the path . . . if that primal impulse is wrenched back to earth by specious pleasure.'

[5]Inst. I.1.5.

[6]*De Iure Belli. Prol.* 11. 'What we have been saying [that is regarding the natural law] would have some foundation, even if we were to grant . . . that there is no God!'

[7]1a-2ae. 95, 2. 'That law which is not just seems to be no law at all. So the validity of a law is proportionate to its justice'. 'Every human law has just so much of the character of law as it is derived from the natural law. But if in any point it conflicts with the natural law, it is no longer a law but a corruption of law'. The first sentence of all is a quotation from St Augustine.

as general propositions within the context of Thomistic philosophy they are unexceptionable; but if on examining their implications the lawyer concludes that it will make no difference to his jurisprudence whether he accepts them or rejects them, he will treat them as unverifiable; and in fact wherever the natural law theory is tested in this way, the results are so unrewarding as to raise serious doubts as to its utility.

In the first place, St Thomas carefully qualifies his rejection of unjust laws: 'in quantum habet de iustitia in tantum habet de virtute legis'. It is hard to conceive of any probable enactment that would be wholly devoid of justice, so that in practice almost any norm will qualify for the name of law, even if imperfectly. Few if indeed any laws are perfect, yet the natural law theorist will accept them as *lex* even though a better law is conceivable. Again, a law may be just in its general application and yet be unjust in a particular case; whatever the natural lawyer may have to say about the function of equity within the system or the duties of the court in the particular case he will not claim that the law itself is merely a *legis corruptio*. In none of these cases does the natural law doctrine appear to be specific enough to make any material difference, either practical or theoretical. This suspicion that the natural law is unable to descend into the arena and modify actual situations is confirmed at every turn. Thus, the principle of the greater good (or the lesser evil) may quite consistently with natural law principles permit the legislator to protect institutions which are themselves immoral: thus prostitution may in certain circumstances be regulated (and not merely forbidden or penalized) by statute. The criticism often made of the natural law theory that it involves a confusion between law and morality is misjudged; it falls outside the scope of this article to amplify this point, which is admirably dealt with by Professor D'Entrèves in his lecture on *Law and Morals*,[8] but the fact is that here the doctrine, this time by virtue of its very merit in distinguishing the legal from the moral order, fails to make any specific contribution of its own and offers no guidance that other theories cannot as satisfactorily provide.

Again, in the great majority of cases it is at least as important that some legal norm should exist as that it should take one form rather than another. This is obvious in, say, traffic regulations but it is equally true in a much wider sphere. The substantive rules of contract are not as important as the actual existence of some known law: what matters is that the parties to an agreement should know what obligations the law imposes on each, what terms the law will leave to the parties to deter-

[8]Dominican Studies, II (1949), pp. 236–248.

mine, what implications it will read into the contract when the parties are silent and what rules of construction it will follow in the event of dispute. In England, I am not bound by a formless unilateral promise without consideration; in Scotland (subject to restrictions of proof) I am. Both rules can be defended on grounds of natural justice, and the natural law theorist must conclude with any other that provided a rule exists it matters little what it is. Once again the natural law makes no special contribution to jurisprudence. Further, if the substance or content of a given tract of law is generally of secondary importance, it follows that the creative lawyer's task in developing the law is not so much to pursue a 'justice' that is normally adequately served by the mere fact of the law's existence, as to maintain the inner logic and internal consistency of this system. He will seek to make the law grow through its own inherent dynamic and to create in this way an organic corpus of rational and so far as possible predictable law, in which the principles animating a part of it will animate the whole. The Scottish lawyer when he works to uphold the native and civilian traditions of his law does so not out of chauvinism or from some belief that the law of Scotland is in some way 'better' or more consonant with natural justice than the law of England, but because it has its own logic and principles which mean that its merit as a legal system will depend on its fidelity to them.

This is not to erect the law into a sovereign in the manner of Coke: obviously the legislator will intervene where necessary to reform, but he will if he is wise disturb the law as little as possible consistently with correcting the defects he seeks to cure. If the natural law has any place in legal development it is here, in the reform of the law and in legislation, and not in its internal growth, that we should expect to find it of assistance, since it is at this point that a conscious pursuit of 'justice' has its place. Yet once the most primitive stage of law-making has been passed it is hard to see how the doctrine can give any help at all, and indeed one of the most effective criticisms of the natural law theory is precisely that although it may enunciate admirable propositions of a general and abstract kind it is incapable of translation into rules of any sort of particularity. Where attempts have been made to particularize it the results have not secured that prompt recognition from other natural law thinkers that one might look for in a doctrine which is claimed to be rational and deducible. When it comes to the application of natural law principles to concrete situations every man is his own reasoner, and the self-evidencing character that might be thought the

whole merit of the doctrine disappears. Argument between rival natural lawyers resolves itself into disputes of a 'more-natural-than-thou' type, and the controversy has to be settled by the application of quite other criteria. Thus at the very point where the doctrine might be expected to be of most value it is found quite ineffectual.

This critique of the natural law theory as an instrument of jurisprudence may be concluded by a reference to what is perhaps its most obvious practical defect. Within any legal system (including the canon law), no formal distinction can be made between just and unjust laws. Both emanate from the same authority, both are mediated through the same organs, both are administered by the same courts and supported by the same sanctions. It would be grotesque to speak of 'law' only when the norm in question was just and of 'enactments formally and procedurally resembling law' when the norm was unjust. In the first place it must be settled who is to decide on the justice or injustice of the norm—a problem that can be solved only by the provisions of the law itself, for otherwise no legal order could exist at all. In the second place, it would within the system be a distinction without a difference that left things exactly as they would be if all enactments were equally called 'law'. The only significant, and hence the only meaningful, definition of law is one that excludes all reference to the substance of the norm considered and restricts itself to the juridical status of the norm within the legal system involved.

If the natural theory is useless as a lawyer's tool it is of no greater value as a means of protecting society against injustice. It is frequently supposed that the natural law doctrine provides a surer guarantee of justice than that offered by more positivist theories. Thus Kelsen's declaration that 'the juridical science of the nineteenth and twentieth centuries expressly declares itself incapable of drawing the problem of justice into the scope of its enquiries' is set against St Thomas's affirmation of the relevance of 'iustitia' to 'lex', with the suggestion that the law is as it were safer in the hands of a natural lawyer than in those of a legal positivist for whom one system is as good as another. That a system of law should be just is a proposition with which few will quarrel, but quite apart from the impotence of the natural law to secure this end within any particular system, the notion that at least its intentions are better rests upon a serious misunderstanding. The question involved here is not whether justice is the proper end of law but whether it operates as its formal or as its efficient cause. The positivist is not necessarily any less concerned for justice than the natural lawyer;

the difference is simply that while the positivist feels this concern in his capacity as a citizen, as a moral being, possibly as a Christian, the natural lawyer feels it precisely in his capacity as a jurist. Provided a man is animated by a desire for justice, it matters little whether he inserts this desire into his juristic theory or brings it to bear upon the law from without. Controversy on this point is almost entirely semantic, but confused thinking has led to well-meaning but misguided attempts to endow the natural law theory with a unique protective value against injustice that cannot be claimed for it. Neither Christians nor natural lawyers have a monopoly of moral principles, and it is the presence or absence of these principles that matters, not the logical mode in which they are related to legal theory.

The aim of this critique has been to present some of the more serious objections that can be levelled against the theory of the natural law, whether as a rational apologetic, an instrument of jurisprudence or a safeguard of justice; but this is not to say that the doctrine is to be discarded or depreciated as a part of that ensemble of thinking that we may call Christian philosophy. The Thomistic synthesis of nature and grace, of which the doctrine of the natural law is an organic part, is possibly the most notable achievement of the Catholic intelligence; this essay has only suggested that (at least since Hume) the doctrine is not viable outside that synthesis, or at any rate outside some comparable system that depends at some point upon faith or some other wider assent. The *fides quaerens intellectum* will find in the Thomistic synthesis, and in the theory of the natural law, a satisfying and persuasive doctrine that it may accept as truth. This truth will be apprehended as a natural truth, independent of revelation, and will form part of an interlocking system of faith and reason whose unity and cogency will as we hope induce assent and perhaps lead to faith in those to whom it is presented. Seen in the context of such a Christian cosmology, an unjust law will be recognized as unable to command allegiance, not because it denies revealed truth or conflicts with a positive divine command, but because it involves the use of man's free will to frustrate that eternal law of nature that Gaius describes as 'cum ipso humano genere proditum'[9], and so is a wrong done to man as such. St Thomas's teaching on the natural law performs a vital part in illustrating this principle and in relating it to other natural and supernatural truths. But the Christian jurist, while perhaps accepting the natural law doctrine as a part of this general cosmology, will guard against the mistake of treating it as

[9]D. 41.1.1.pr.

though it could perform an independent apologetic, juristic or social function to which it is not adapted and for which it was not essentially designed.

The New English Bible

A SURVEY OF THE CRITICS

'Well, if that's what St Paul meant, I disagree with St Paul'. This remark is attributed to 'no less a person than a master of a college in one of our older universities', who had enquired what it was that was read in chapel that evening and had been told it was the N.E.B. The story is told by Dr Wickham, Bishop of Middleton, in the *Guardian* (14/3/61), as an example of the impact of the new text. Impact, certainly, and most of the reviewers have agreed about this. But the remark also suggests that it might be questioned whether it was the impact intended by St Paul.

A first enquiry is about whom the version is written for, and whether it is reaching its aim. Fr Alexander Jones in *Scripture* (July '61) says, 'It is only fair to remember that a translation is made with a determined public in view. Now the N.E.B. is not designed as a tool for biblical theology, and indeed it is reasonable to suppose that a theologian would know his Greek and need no N.E.B.; it is a faithful, somewhat free, easy-to-read translation, addressed (as I have seen suggested) to unbelievers and even potential unbelievers, conciliatory . . . and supremely competent'. Yet the theologian is entitled to turn to a version in a difficult passage, when the version conveys an interpretation. The translators themselves mention this question of interpretation when speaking in their introduction of not feeling obliged to render the same Greek word everywhere by the same English word: 'we have found that in practice this frequently compelled us to make decisions where the older method of translation allowed a comfortable ambiguity. In such places we have been aware that we take a risk, but we have thought it our duty to take the risk rather than remain on the fence' (p. ix). Dr Witham in 1730, in his preface to his revision of Rheims, says: 'It must needs be own'd that many places in the Holy Scripture are obscure and hard to be understood . . . They must be obscure in a literal translation, as they are in the Original'. But it is a far cry from 1730 to 1961 and the N.E.B. translators remark that 'if the best commentary is a good translation, it is also true that every intelligent translation is in a sense a paraphrase' (p. x), and after all, Knox had already said much the same.

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